

Law Office of Jack Silver

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Via Certified Mail - Return Receipt Requested

March 1, 2016

Richard Norwood
Citizen Suit Coordinator
U.S. Department of Justice
Environment and Natural Resource Division
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415

DEPT OF JUSTICE - EAND
ENVIRONMENTAL DIVISION
16 MAR -8 P5:00

Re: *California River Watch, an IRC Section 501(c)(3), non-profit, public benefit corporation v. City of Santa Rosa*
USDC Case No.: 3:15-cv-02349 LB

Dear Mr. Norwood:

Enclosed please find a fully executed Settlement Agreement and Mutual Release of Claims ("Agreement") by the parties to the above-referenced action. This Agreement is being served pursuant to Section 505(c)(3) of the federal Clean Water Act, 33 U.S.C. § 1365(c)(3), for agency review and comment, where appropriate, within 45 days of service hereof.

Very truly yours,

Jack Silver

JS:lhm

Enclosure

cc: Nicole E. Granquist, Esq.
Jerry Bernhaut, Esq.

SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS

This Settlement Agreement and Mutual Release of Claims ("Agreement") is entered into between California River Watch ("CRW") and the City of Santa Rosa ("City") (collectively, the "Parties") with respect to the following facts and objectives:

RECITALS

WHEREAS, CRW is a 501(c)(3) non-profit, public benefit corporation organized under the laws of the State of California, with headquarters located in Sebastopol, California and offices in Los Angeles, California. The mailing address of River Watch's northern California office is 290 S. Main Street, #817, Sebastopol, CA 95472. The mailing address of River Watch's Southern California office is 7401 Crenshaw Blvd. # 422, Los Angeles, CA 90043.

River Watch is dedicated to protecting, enhancing, and helping to restore surface and ground waters of California, including rivers, creeks, streams, wetlands, vernal pools, aquifers and associated environs, biota, flora and fauna, and educating the public concerning environmental issues associated with these environs.

WHEREAS, the City, organized under the laws of the State of California, owns and operates a collection system for the purpose of collecting and conveying for treatment wastewater from residential, commercial, and industrial sources, and owns and operates a wastewater treatment plant and recycled water storage facilities for the treatment of wastewater and reuse of recycled water ("POTW Facilities");

WHEREAS, on or about January 21, 2015, CRW provided the City with a Notice of Violation and Intent to File Suit under the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. §1365, ("CWA Notice Letter");

WHEREAS, on or about May 27, 2015, CRW filed a Complaint against the City in the United States District Court, Northern District of California, Case No. 3:15-cv-02349-LB ("Complaint");

WHEREAS, the City denies any and all of CRW's allegations and claims in the CWA Notice Letter and Complaint;

WHEREAS, CRW and the City, through their authorized representatives and without either adjudication of CRW's claims or admission by the City of any alleged violation or other wrongdoing, have chosen to resolve in full CRW's allegations in the CWA Notice Letter and the Complaint through settlement and avoid the cost and uncertainties of further litigation; and

WHEREAS, CRW and the City have agreed that it is in their mutual interest to enter into this Agreement setting forth the terms and conditions appropriate to resolving CRW's allegations set forth in the CWA Notice Letter and Complaint.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, CRW and the City hereby agree as follows:

AGREEMENT

1. Definitions

A. Effective Date: The term "Effective Date," as used in this Agreement, shall mean the day the District Court enters an order granting the Parties' stipulation to dismiss CRW's claims with prejudice as described in Section 11 of this Agreement.

B. Condition Assessment: The term "Condition Assessment" shall mean a report that comprises inspection, rating, and evaluation of the existing condition of a gravity sewer collection system. Inspection is based upon closed circuit television ("CCTV") inspections for gravity mains, manhole inspections for structural defects, and inspections of pipe connections at the manhole. After CCTV inspection occurs, pipe conditions are assigned a grade based on the Pipeline Assessment and Certification Program ("PACP") rating system, developed by the National Association of Sewer Service Companies. The PACP is a nationally recognized sewer pipeline condition rating system for CCTV inspections.

C. Full Condition Assessment: A Condition Assessment of all gravity sewer lines except for gravity sewer lines (not force mains) located within two hundred (200) feet of surface waters, defined as a river, creek, or stream (*i.e.*, those gravity sewer lines not included in the definition of Surface Water Condition Assessment).

D. Surface Water Condition Assessment: A Condition Assessment of gravity sewer lines (not force mains) within two hundred (200) feet of surface waters, defined as a river, creek, or stream.

E. Significantly Defective: A sewer pipe is considered to be "Significantly Defective" for purposes of this Agreement if the pipe's condition receives a structural grade of five (5) based on the PACP rating system. The PACP assigns grades based on the significance of the defect, extent of damage, percentage of flow capacity restriction, and/or the amount of pipe wall loss due to deterioration. Grades are assigned as follows:

- 5 — Most significant defect
- 4 — Significant defect
- 3 — Moderate defect
- 2 — Minor to moderate defect
- 1 — Minor defect

2. Collection System Investigation & Repair

A. Surface Water Condition Assessment

(i) The City shall continue to complete a Surface Water Condition Assessment every five (5) years after the Effective Date of this Agreement, excepting those gravity sewer lines that have been inspected by CCTV within the last five (5) years or constructed within the last ten (10) years.

(ii) Within five (5) years of the Effective Date of this Agreement, the City shall repair, replace, or take other appropriate action for gravity sewer lines rated Significantly Defective (PACP structural rating grade 5) by the City's existing Surface Water Condition Assessment, completed as of the effective date of the Agreement. The phrase "take other appropriate action" in this circumstance means to divert sewage flow from a Significantly Defective sewer line or abandon the Significantly Defective sewer line in lieu of repair or replacement.

(iii) With respect to sewer lines that receive a PACP rating grade 4 by the Surface Water Condition Assessment, the City will ascertain whether such lines need to be repaired or re-CCTV'ed.

B. Full Condition Assessment

(i) Within seven (7) years of the Effective Date of this Agreement, the City shall complete a Full Condition Assessment, excepting those gravity sewer lines that have been inspected by CCTV within the last five (5) years or constructed within the last ten (10) years.

3. Collection System Overflow Response and Reporting

A. Volume and Flow Estimations: The City shall augment Element 6 of the City's Sewer System Management Plan ("SSMP"), entitled "Overflow Emergency Response Plan," to include more specific language related to calculating sanitary sewer overflow ("SSO") volume, as set forth below:

"Volume and flow estimations may be based on the following:

- (i) Calculation of the area and depth of the SSO (involves investigating the surrounding area for evidence of ponding or other evidence of SSO volumes);
- (ii) Where the rate of overflow is known, multiply the duration of the overflow by the overflow rate;
- (iii) Estimation of CWEA Manhole Overflow Gauge Worksheet;
- (iv) Flow meter reading or SCADA in the collection system or pump stations;
- (v) Pump run times and pump discharge volume ratings;
- (vi) Water usage information for customers who discharge into the collection system;
- (vii) If the entire spill is captured, the tank level indicator; and/or
- (viii) Any other relevant technical or collection system information."

The City shall include in SSO reports submitted to the California Integrated Water Quality System Project ("CIWQS") the method(s) used for spill calculation.

B. Witness Reports: The City shall continue to document any corroborated witness statements for use during SSO identification and volume calculation processes.

C. Photographs: The City shall continue its practice of taking photographs of an SSO event. The City shall augment the SSMP description at Element 6, Section III. F., to state that where safe and possible, photographs should be taken that may aid in establishing and justifying spill volume.

D. Water Quality Sampling: The City will augment its existing water quality sampling program set forth in Element 6 of the SSMP by conducting water quality sampling, where feasible, for Escherichia Coli ("E. Coli") and Ammonia, for any SSO that is greater than fifty (50) gallons and reaches surface waters. Feasibility for obtaining a sample will involve whether sufficient flow exists to collect a representative, uncontaminated sample, and whether weather or other conditions allow City staff to safely obtain a sample (*i.e.*, City staff will not be placed at risk for injury in severe weather).

For two (2) years from the Effective Date of the Agreement, in the event that an SSO reaches surface waters that equals or exceeds one thousand (1,000) gallons, the City shall, where feasible, conduct sampling and analysis for CAM-17 metals on the SSO discharge. Feasibility for obtaining a sample will involve whether sufficient flow exists to collect a representative, uncontaminated sample, and whether weather or other conditions allow City staff to safely obtain a sample (*i.e.*, City staff will not be placed at risk for injury in severe weather). The results of any such sampling will be made available to CRW at the City's offices. If no qualifying SSO event (SSO reaching surface waters that equals or exceeds 1,000 gallons) occurs within two (2) years of the Effective Date, the timeframe for conducting this sampling and analysis will be extended for one (1) additional year; after the first qualifying event in that year, or the expiration of the additional year, no further sampling and analysis of CAM-17 metals is required.

Any requirements under this provision which conflict with sampling or testing requirements by a regulatory agency (*e.g.*, the sampling location, frequency, parameters analyzed, etc.), either currently in effect or adopted in the future, shall cease to be in effect under the Agreement between the Parties. The absence of sampling or testing requirements by a regulatory agency shall not be considered a conflict with regulatory agency requirements.

E. Investigation and Repair: The City shall continue its practice of investigating the cause of an SSO entering surface waters and will employ the following measures to prevent future overflows: (a) if the SSO is caused by a structural defect, then the City will take timely action to repair or replace the defect, or take other action necessary to protect water quality (*e.g.*, divert the flow until the repair/replacement can occur); and (b) if the defect is non-structural, such as a grease blockage or vandalism to a manhole cover, the City will implement appropriate measures (*e.g.*, additional maintenance or cleaning), where feasible, to address the cause.

4. CIWQS Link

The City shall create a link from the City's website to the State Water Resources Control Board's CIWQS SSO Public Reports' website, and shall publicize this new link to customers and members of the public. Additionally, the City shall publicize the 24-hour, 7 day per week emergency hotline on the City's website.

5. Recycled Water Storage Ponds

The City shall utilize the formula below to calculate, on a quarterly basis, the potential mass of total phosphorus that may reach, via subsurface means, the Laguna de Santa Rosa from the City's recycled water storage ponds, for additional inclusion in the compliance determination set forth in Section VII.N.1. of the City's NPDES permit, North Coast Regional Water Quality Control Board ("Regional Water Board") Order No. R1-2013-0001; this obligation shall commence for the 2016-2017 discharge season. Recycled water storage ponds referenced in the formula are those that are City-owned and operated and currently used for recycled water storage.

Total Phosphorus = Net Recycled Water Volume multiplied by the actual quarterly average total phosphorus concentration in recycled water stored in the recycled water storage ponds or the actual quarterly average total phosphorus concentration of the treated recycled water generated from the City's treatment facility, whichever is higher.

Net Recycled Water Volume = (total storage in recycled water storage ponds at beginning of quarter + total quarterly discharge to recycled water storage ponds from the City's treatment facility + total quarterly gain from rain) – (total quarterly discharge from recycled water storage ponds for reuse (*e.g.*, Geyers project, irrigation, other reuse) + total quarterly point source discharge to surface waters + total quarterly loss due to evaporation + total storage in recycled water storage ponds at end of quarter).

In the event the Regional Water Board imposes alternative regulatory requirements on this issue, or adopts a total maximum daily load ("TMDL") for nutrients, this requirement shall be superseded and the City shall no longer be required to comply with this term.

6. Supplemental Environmental Project

The City shall fund and implement the following Supplemental Environmental Project ("SEP"), which the Parties agree is intended to secure significant benefits to the local environment: within thirty (30) days from the Effective Date of this Agreement, the City shall provide \$35,000.00 to fund the Sonoma County Youth Ecology Corps, a jobs, workforce training and ecosystem education program aimed at employing youth and young adults while teaching them about environmental stewardship, for the purpose of performing beneficial water quality projects in the Laguna de Santa Rosa and Santa Rosa Creek watersheds (*e.g.*, trash removal, addressing invasive species, planting of trees, maintenance of native plants and restoration areas). Plaintiffs shall not receive any of the SEP payment to use for any purpose.

7. Termination of 2005 Settlement Agreement Between CRW and the City

The 2005 Settlement Agreement between CRW and City is hereby superseded and terminated as of the Effective Date of this Agreement, and shall be without further force or effect. Provisions continued from the previous 2005 Settlement Agreement incorporated into this Agreement, become enforceable only under this Agreement.

8. CRW Attorney's Costs and Fees

Within thirty (30) calendar days after the Effective Date of this Agreement, the City shall pay CRW the sum of seventy thousand dollars (\$70,000.00) as reimbursement for CRW's investigative, expert and attorneys' fees and costs. Payment shall be made by the City to CRW in the form of a single check payable to "California River Watch," and shall constitute full satisfaction and payment for all costs of litigation and attorneys' fees incurred by CRW that have or could have been claimed in connection with CRW's allegations in its CWA Notice Letter and the Complaint up to and including the Effective Date of this Agreement, and for CRW's expert and attorneys' fees and costs spent monitoring and enforcing the City's compliance with ongoing obligations under this Agreement up to and including the Termination Date, with the exception of any action taken to enforce this Agreement in accordance with the dispute resolution procedures set forth in Section 12. below.

Payment shall be mailed to the Law Office of Jack Silver, P.O. Box 5469, Santa Rosa, California 95402 or, if via Federal Express or other overnight service, to Law Office of Jack Silver, 100 E Street, Suite 318, Santa Rosa, California 95404.

9. Termination Date

This Agreement shall terminate seven (7) years from the Effective Date.

10. No Admission or Finding

Neither this Agreement nor any payment pursuant to the Agreement shall constitute evidence or be construed as a finding, adjudication, or acknowledgment of any fact, law or liability, nor shall it be construed as an admission of violation of any law, rule or regulation. However, this Agreement and/or any payment pursuant to the Agreement may constitute evidence in actions seeking compliance with this Agreement.

11. Mutual Release of Liability, Covenant Not to Sue, and Dismissal

A. In consideration of the above, and except as otherwise provided by this Agreement, the Parties hereby forever and fully release each other and their respective successors, assigns, directors, officers, agents, board members, representatives, and employees, and all persons, firms and corporations having an interest in them, from any and all environmental claims and demands of any kind, nature, or description whatsoever, and from any and all liabilities, damages, injuries, actions or causes of action, either at law or in equity, whether known or unknown, which the Parties have or may have against each other based upon CRW's allegations as set forth in the CWA Notice Letter and Complaint as to the City's POTW Facilities up to and including the Effective Date of this Agreement.

B. The Parties acknowledge that they are familiar with section 1542 of the California Civil Code, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

The Parties hereby waive and relinquish any rights or benefits they may have under California Civil Code section 1542 with respect to any other claims against each other arising from, or related to, the allegations and claims as set forth in the CWA Notice Letter and Complaint.

C. Beginning on the Effective Date and terminating seven (7) years thereafter, CRW agrees that neither CRW, its officers, executive staff, members of its governing board nor any organization under the control of CRW, its officers, executive staff, or members of its governing board, will serve any 60-day Notice Letter or file any lawsuit against the City seeking relief for alleged violations of the Clean Water Act or RCRA, or similar state statutes and/or regulations, including the California Porter-Cologne Water Quality Control Act for the City's POTW Facilities, nor will CRW support such lawsuits against the City brought by other groups or individuals by providing financial assistance, personnel time, or any other affirmative actions.

D. CRW shall submit this Agreement to the United States Department of Justice and United States Environmental Protection Agency (the "Agencies") for the 45-day agency review period consistent with 33 U.S.C. § 1365(c) and 40 C.F.R. § 135.5. After comment by the United States, or the 45-day agency review period has expired, whichever is earlier, CRW shall file with the District Court a Notice of Dismissal With Prejudice, providing that CRW's Complaint and all claims therein shall be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). In the event that the Agencies comment negatively on the provisions of this Agreement, CRW and the City agree to meet and confer to attempt to resolve the issue(s).

12. Dispute Resolution Procedure

A. Any disputes with respect to any of the provisions of this Agreement shall be resolved through the following procedure. The Parties covenant and agree that, if either party believes the other is in violation of one or more terms of the Agreement, the party shall provide notice to the other in writing of what actions or inactions they deem to be in violation of this Agreement. Within thirty (30) days of receipt of such notice, the party receiving the notice shall respond to the notice in writing. If the Parties still dispute compliance with this Agreement, within an additional thirty (30) days, the Parties will meet and confer in a good faith attempt to resolve their dispute. If the Parties cannot informally resolve the dispute, they shall first attempt to resolve such dispute through mediation, using a mutually agreed upon mediator. Should mediation be unsuccessful, then the Parties will enter into binding arbitration, conducted by an arbitrator agreed upon by both Parties. Either party may request that the presiding judge of the Sonoma County Superior Court may select an arbitrator if the Parties cannot reach an Agreement. The arbitration shall be binding and not subject to ordinary judicial appeal; however, it shall be subject to the procedural provisions provided for under California Code of Civil Procedure sections 1280, *et seq.* The arbitration shall be conducted in accordance with the arbitration rules and procedures of JAMS (Judicial Arbitration and Mediation Service) to the extent other conventional rules are not promptly agreed to by the Parties. The relief the arbitrator is empowered to award is limited to injunctive relief to take action specified in this Agreement. The Parties shall each bear their own costs and attorney's fees in connection with the arbitration.

B. If CRW asserts that the City is in violation of this Agreement, and the City corrects the action or inaction within sixty (60) days of written notice from CRW describing the asserted violations, no further enforcement action under the terms of the Agreement shall be taken by either party.

13. Force Majeure

Separate from, and in addition to, any other limitations on the City's obligations under this Agreement, the City's obligations to comply with any provisions of this Agreement shall be excused or deferred if compliance, or a delay in compliance, is caused by an event or circumstance beyond the reasonable control of the City or any entity controlled by the City, including its contractors, and which event or circumstance could not have been reasonably foreseen and prevented by the exercise of due diligence by the City. Where implementation of the actions set forth in this Agreement, within the deadlines prescribed, becomes unachievable, despite the timely good faith efforts of the City, the City shall notify CRW in writing within sixty (60) days of the date that the City knew of the event or circumstance precluding compliance, and shall describe the reason for the non-performance. The Parties agree to meet and confer in good faith concerning the non-performance and, where the Parties concur that the non-performance was or is impossible, despite the timely good faith efforts of one of the Parties, compliance shall be excused or new performance deadlines shall be established by Agreement of the Parties. In the event that the Parties cannot timely agree, either party shall have the right to invoke the dispute resolution procedure described herein.

14. General Provisions

A. **Construction.** The language in all parts of this Agreement shall be construed according to its plain and ordinary meaning, except as to those terms defined by law, in the Clean Water Act, or specifically herein.

B. **Choice of Law.** This Agreement shall be governed by the laws of the United States, and where applicable, the laws of the State of California.

C. **Severability.** In the event that any provision, section, or sentence of this Agreement is held by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

D. **Correspondence.** All notices required herein or any other correspondence pertaining to this Agreement shall be sent by regular, certified, overnight, or electronic mail as follows:

If to CRW:

California River Watch
290 S. Main Street, Suite 817
Sebastopol, CA 95472
Telephone: (707) 528-8175
Facsimile: (707) 528-8675

And to:

Jerry Bernhaut
c/o California River Watch
Law Office of Jack Silver
P.O. Box 5469

Santa Rosa, CA 95402-5469
Telephone: (707) 595-1852
j3bernhaut@gmail.com

If to the City:

David Guhin
Director, Santa Rosa Water
City of Santa Rosa
69 Stony Circle
Santa Rosa, CA 95401
Telephone: (707) 543-4299
dguhin@srcity.org

Caroline L. Fowler
City Attorney
City of Santa Rosa
100 Santa Rosa Avenue, Room 8
Santa Rosa, CA 95404
Telephone: (707) 543-3040
CFowler@ci.santa-rosa.ca.us

And to:

Nicole E. Granquist
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
Telephone: (916) 444-1000
ngranquist@downeybrand.com

Notifications of communications shall be deemed submitted on the date that they are sent by electronic mail, postmarked and sent by first-class mail, or deposited with an overnight mail/delivery service. Any change of address or addresses shall be communicated in the manner described above for giving notices.

E. **Counterparts.** This Agreement may be executed in any number of counterparts, all of which together shall constitute one original document. Telecopy, electronic, and/or facsimile copies of original signature shall be deemed to be originally executed counterparts of this Agreement.

F. **Assignment.** Subject only to the express restrictions contained in this Agreement, all of the rights, duties and obligations contained in this Agreement shall inure to the benefit of and be binding upon the Parties, and their successors and assigns.

G. **Modification of the Agreement.** This Agreement, and any provisions herein, may not be changed, waived, discharged or terminated unless by a written instrument, signed by the Parties.

H. **Full Settlement.** This Agreement constitutes a full and final settlement of this matter. It is expressly understood and agreed that the Agreement has been freely and voluntarily entered into by the Parties with and upon advice of counsel.

I. **Integration Clause.** This is an integrated Agreement. This Agreement is intended to be a full and complete statement of the terms of the Agreement between the Parties and expressly supersedes any and all prior oral or written Agreements covenants, representations, and warranties (express or implied) concerning the subject matter of this Agreement.

J. **Negotiated Agreement.** The Parties have negotiated this Agreement, and agree that it shall not be construed against the party preparing it, but shall be construed as if the Parties jointly prepared this Agreement and any uncertainty and ambiguity shall not be interpreted against any one party.

K. **Authority.** The undersigned representatives for CRW and the City each certify that he or she is fully authorized by the party whom he represents to enter into the terms and conditions of this Agreement.

The Parties hereby enter into this Agreement.

Date: 2/17, 2016

CALIFORNIA RIVER WATCH

By: 

Name: Larry Hanson

Title: Manager and President

Date: _____, 2016

CITY OF SANTA ROSA

By: _____

Name:

Title:

G. **Modification of the Agreement.** This Agreement, and any provisions herein, may not be changed, waived, discharged or terminated unless by a written instrument, signed by the Parties.

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K. **Authority.** The undersigned representatives for CRW and the City each certify that he or she is fully authorized by the party whom he represents to enter into the terms and conditions of this Agreement.

The Parties hereby enter into this Agreement.

Date: _____, 2016

CALIFORNIA RIVER WATCH

By: _____

Name:

Title:

Date: Feb. 25, 2016

CITY OF SANTA ROSA

By:  _____

Name: John Sawyer

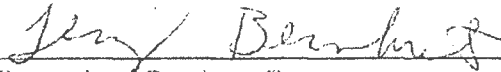
Title: Mayor

APPROVED AS TO FORM:

For CRW:

Date: Feb. 11, 2016

LAW OFFICE OF JACK SILVER


By: Jerry Bernhaut, Esq.

For the City:

Date: _____, 2016

DOWNEY BRAND LLP

By: Nicole Granquist, Esq.

APPROVED AS TO FORM:

For CRW:

Date: _____, 2016

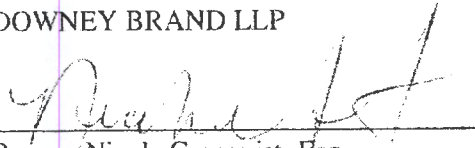
LAW OFFICE OF JACK SILVER

By: _____
Jerry Bernhaut, Esq.

For the City:

Date: 2/23, 2016

DOWNEY BRAND LLP

By: 
Nicole Granquist, Esq.

Law Office of Jack Silver
P.O. Box 5469
Santa Rosa, CA 95402-5469

CERTIFIED MAIL™



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Richard Norwood
Citizen Suit Coordinator
U.S. Department of Justice
Environment and Natural Resource Division
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415

FROM: LAW OFFICE OF JACK SILVER
CARR: United States Postal Service
TRK#: 70130600000027463045
RCVD: 3/8/2016 1048

TO: Reed, Jason
PH: 202/353/7550
BDG: PHB
RM: 2121
PCS: 1



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RTE:
MSC:
Reed, Jason